

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2009

Docket No. 74-2009

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

-VS-

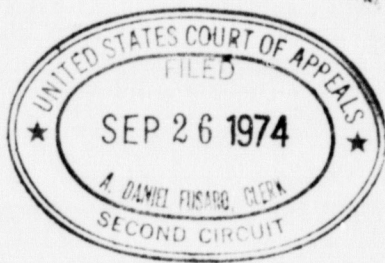
TERRY WAYNE JENKINS,

Appellant

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CR, 1974-105

BRIEF OF THE APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

TERRY WAYNE JENKINS,

Defendant-Appellant.

B R I E F

Docket No. 74-2009

STATEMENT

This Brief is submitted on behalf of the Defendant-Appellant, TERRY WAYNE JENKINS, for reversal of the Jury Verdict rendered on the 19th day of June, 1974, in the United States District Court for the Western District of New York, the Honorable John T. Curtin presiding, convicting the Defendant-Appellant of 1) violation of Title 18, U.S.C. Section 2115, the forcible breaking into a building used as a Post Office of the United States with intent to commit larceny therein; and 2) violation of Title 18, U.S.C. Section 1707, the theft of property used by the United States Postal Service with a value in excess of \$100.00.

The Defendant-Appellant herein was arraigned before the U.S. Magistrate on April 26, 1974. Thereafter on May 7, 1974 motions were made for certain relief therein, including but not limited to lists of all witnesses to be presented at trial. That on May 28, 1974, said argument of said discovery and other relief was made before the U. S. Magistrate. That as a result of said hearing, the relief sought by the Defendant-Appellant was denied. The case was tried on June 18 and 19, 1974. Thereafter, on July 15, 1974, after the Defendant-Appellant's trial, sentencing was pronounced by Judge John T. Curtin.

F A C T S

That the facts as presented at trial are as follows:

1. The burglary occurred on February 25 or 26th, 1973 at the North Tonawanda Post Office, North Tonawanda, New York.
2. The Post Office was supposedly entered from the rear window and entry made by breaking the window.
3. The Defendant was allegedly living in the area at the time of the burglary with one of the witnesses, Mary Diaz at 68 Oliver Street, North Tonawanda, New York.
4. The primary witness, Mary Diaz, and the Defendant-Appellant knew each other from a prior relationship while living in Florida.
5. That subsequent to the Post Office burglary, approximately a week thereafter, the Defendant-Appellant allegedly left the North Tonawanda, New York area for Indianapolis, where he was to, according to the witness, Mary Diaz, visit his brother and sell the proceeds of the burglary.
6. That in early May of 1973, the witness, Candy L. Brainard, places the Defendant-Appellant in Fort Lauderdale, Florida, with some of the proceeds from the alleged Post Office burglary.
7. That the facts do not disclose any investigation conducted by the Federal Authorities, either in Indianapolis or in Florida, to verify or disprove any statements of the witnesses.

A R G U M E N T S

74-2009

Upon the facts and pleadings in this case, the Defendant-Appellant submits the following:

1. The lower court erred and abused its discretion in not allowing the Defendant-Appellant a list of the Government's proposed witnesses at trial for reasons as to be enumerated henceforth.
2. The court below erred in not allowing the Defendant-Appellant, on cross-examination to impeach the Government's witnesses with regard to prior acts of misconduct committed by said witnesses.

POINT I

THE COURT BELOW ERRED AND ABUSED ITS DISCRETION IN NOT PROVIDING THE DEFENSE PRIOR TO TRIAL A LIST OF THE GOVERNMENT'S PROPOSED WITNESSES, THEREBY DENYING THE DEFENDANT DUE PROCESS AND THE INABILITY TO PROPERLY INVESTIGATE AND PREPARE FOR TRIAL.

It is not denied by the Defendant-Appellant herein that a defendant has no absolute right to obtain the names of the Government's witnesses in advance of trial, except in capital cases, pursuant to Rule 16 of the Federal Rules of Criminal Procedure. United States v. Westmoreland, (S. D. Ind. 1967), 41 F. R. D. 419; Downing v. United States, (C. A. 5th 1965), 348 F. 2d 594, Cert. denied (1966), 382, U.S. 901; Hamer v. United States, (C.A. 9th 1958) 259 F. 2d 274, Cert. denied 1959, 359 U.S. 916.

The Defendant-Appellant does contend, however, that the Court does possess inherent power to order disclosure of matters not included within Rule 16, and the ruling on such a motion is reviewable for abuse of discretion. The court should consider the relative need for such information to prepare the defense. United States v. Cole, (C. A. 8th 1971), 449 F. 2d 194. The Court in Cole, however, did rule that alleged threats and intimidation of prospective witnesses was present and stated that no abuse of discretion was present. It has also been stated that disclosure of the names and whereabouts of witnesses may be required Constitutionally. United States v. Mendez-Rodriguez, (C. A. 9th 1971), 450 F. 2d 1. The Court therein ordered the prosecution to disclose the names and addresses of three witnesses to protect the Defendant's due process and confrontation rights. The conviction was reversed on the ground that the Government had deported the witnesses prior to trial, thereby placing them beyond the subpoena powers of the Court and rendering them unavailable as defense witnesses.

That the Court in United States v. Palmisano, (E.B. Pa. 1957), 273 F. Supp. 750, 753, stated in quoting from Fontana v. United States, (C. A. 8th 1919), 262 F. 283:

"The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process."

The Court in Palmisano stated that a defendant would clearly be allowed the disclosure of a victim or participant in the crime. It went on to stated that "neither the language of the statute (Rule 16) nor its legislative history reveals a purpose to deprive this Court of its traditional and important discretion to require limited disclosure of the identity of persons in a non-capital case where such disclosure is essential to give the defendant a fair opportunity to prepare his defense. Indeed, to so read it would be to raise questions of its constitutionality under the Fifth and Sixth Amendments." P. 752.

The facts in this case reveal that the Defendant-Appellant moved this Court on two occasions for disclosure of the list of proposed Government witnesses designated to testify against him and on each occasion such motion and request was denied. No showing by the Government was established that would adequately show that these witnesses were endangered or threatened by the Defendant-Appellant. As it stood, the Defendant-Appellant was incarcerated in Buffalo, New York, with bail being set at \$25,000.00, later reduced to \$10,000.00, with the Defendant-Appellant being without funds and declared indigent, with little prospect of freeing himself prior to trial. The Government further failed to establish that any outside individual other than the Defendant-Appellant was capable of harming or threatening these witnesses, nor that these alleged threats against the proposed witnesses were overheard by any other person besides such witnesses. It was established at trial by the witnesses testifying, to wit: Mary Diaz and Candy L. Brainard, that threats were made against them by the Defendant-Appellant. In listening to and re-reading the testimony by these witnesses, it is evident that the threats were made in a moment of passion, or as an idle boast with no repeated threats

being made thereafter. The witnesses themselves testified that they did not testify or come forward with information due to the fact that they were afraid of the Defendant-Appellant. In reality, however, these witnesses may have been stating threats against them in order to protect themselves from prosecution as a material participants herein. In addition, the Government failed to verify these threats through independent investigation.

These facts and possible explanations were not considered by the Court below, and as a result, its decision was an abuse of its discretion. The Court also failed to take into consideration the Defendant-Appellant's financial status with regard to investigation of this case. We have a situation where travel to and from Indiana and Florida took place subsequent to the crime with testimony herein by Candy L. Brainard, that she witnessed some alleged stamps and other postal materials in the Defendant-Appellant's possession within the State of Florida and again subsequent to the alleged crime. In order to conduct an adequate investigation, and with the limited funds allowed by the Courts for investigation, the Defendant-Appellant needed the names to at least verify their whereabouts during the alleged times in question and to at least be given the opportunity to establish their backgrounds to impeach their credibility at trial. The Defendant-Appellant was denied the names of these witnesses and as such, was denied the right to investigate and prepare his defense and as such, was denied due process of law under the United States Constitution. The Court below could have limited disclosure of the witnesses and rendered any other relief to protect these

witnesses against threats without jeopardizing the Defendant-Appellant's right to at least be aware of potential testimony against him. Therefore, the Defendant-Appellant requests that this verdict against him be reversed and that a new trial be granted so that the Defendant-Appellant may be given the opportunity to prepare an adequate defense.

POINT II

THE COURT BELOW ERRED IN NOT ALLOWING DEFENSE COUNSEL ON
CROSS-EXAMINATION THE RIGHT TO IMPEACH THE GOVERNMENT'S
WITNESSES WITH REGARD TO PRIOR ACTS OF MISCONDUCT.

The Court below restricted the defense counsel's cross-examination of Mary Diaz with regard to prior acts of misconduct supposedly committed by the witness. The record reveals at Page 78 through Page 82 of the Court's opinion and counsel's arguments with regard to this issue. Defense counsel's attempt at Page 80 to establish that the witness was receiving welfare checks by fraud in the State of Florida was not allowed by the Court below.

The general rule of law in the Federal Courts is that a prior bad act cannot be used for impeachment purposes. Lyda v. United States, (C.A. 9th 1963), 321 F. 2d 788; United States v. Beno, (C.A. 2d 1963), 324 F. 2d 582. But the Court in the Lyda case, supra, did state that it was a legitimate issue and an area where cross-examination could be conducted if a witness used false names which bore directly enough on her veracity regarding particular acts of misconduct not amounting to conviction of a crime. It was not within the court's discretion not to allow the cross-examination of this witness with regard to whether she actually was receiving welfare payments under two names. This fraudulent act does, without doubt, go to the witness'

veracity for truth, for it shows that the witness will put forth her own interest ahead of that of another.

Further, in light of the fact that the names of witnesses were not given to the Defendant-Appellant prior to trial, a wider area of cross-examination should have been allowed to at least determine some of the background of the witnesses for the purpose of impeachment of their testimony. Defense counsel was not trying to establish the fact that the witness was on welfare per se, but was trying to establish that she was receiving aid under two names in a fraudulent manner. On this point, the Court below erred.

C O N C L U S I O N S

1. The Court below erred and abused its discretion with regard to failing to provide the Defendant-Appellant with a list of all Government witnesses prior to trial, upon the grounds that said witnesses were needed to prepare an adequate defense and to conduct the Defendant-Appellant's investigation, all prior to trial.

2. The Court below erred in not allowing the defense counsel the right to cross-examine certain Government witnesses with regard to prior acts of misconduct upon the grounds that the Defendant-Appellant's right to confront his accusers was denied and his ability to impeach said witnesses disallowed in light of the inopportunity to know what witnesses would testify prior to trial.

DATED: BUFFALO, NEW YORK
September 18, 1974

Respectfully submitted,

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